No. 85-1258

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD E. BROWN; EDITH R. BROWN; EDWIN E. BROWN; BETTY WOLSFELD; and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969,

Petitioners,

v.

KERR-McGEE CHEMICAL CORPORATION,
a Delaware corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Atomic Energy Act, 42 U.S.C. §2011 et seq. preempts a request for an injunction pursuant to State law to abate a nuisance posed by nonradiation hazards and airborne radiation hazards of material licensed by the Nuclear Regulatory Commission.

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Petitioners, Donald E. Brown, Edith R. Brown, Betty Wolsfeld, and West Chicago State Bank, as Trustee u/t/a 213, dated September 16, 1969, respectfully petition for a writ of certiorari to review the interlocutory judgment of the United States Court of Appeals for the Seventh Circuit entered on July 18, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 767 F.2d 1234 (7th Cir. 1985). It is reproduced in the appendix hereto. (Appendix A, pp. A-1 to A-25) On October 24, 1985, the opinion of the United States Court of Appeals for the Seventh Circuit was modified. The order of modification is reproduced in the appendix hereto (Appendix B, pp. B-1 to B-2).

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1985. A timely petition for rehearing was denied on October 24, 1985. (Appendix B, pp. B-1 to B-2) The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves the interpretation of the Atomic Energy Act (AEA) 42 U.S.C. §2011, et seq. (1954) as amended by the Uranium Mill Tailings Radiation Control Act, P.L. 95-604, 92 Stat. 3022 (1978) (UMTRCA) to determine whether the AEA preempts petitioners' prayer for mandatory injunctive relief.

42 U.S.C. §2021(k) provides:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. §2014(e) provides:

> The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

42 U.S.C. §2014(z) provides:

> The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

42 U.S.C. §2113 provides in pertinent part:

> **(a) Specific assurances in license for pretermination actions**
>
> Any license issued or renewed after the effective date of this section under section 2092 or section 2111 of this title for any activity which results in the production of any byproduct material, as defined in section 2014(e)(2) of this title, shall contain such terms and conditions as the Commission determines to be necessary to assure that, prior to termination of such license—
>
> > (1) the licensee will comply with decontamination, decommissioning, and reclamation standards prescribed by the Commission for sites (A) at which ores were processed primarily for their source material content and (B) at which such byproduct material is deposited, . . .

STATEMENT OF THE CASE

This is an appeal from the interlocutory judgment of the Seventh Circuit Court of Appeals affirming the interlocutory order of the United States District Court for the Northern District of Illinois, Eastern Division, granting Kerr-McGee Chemical Corporation's motion to dismiss Count I of Petitioners' complaint.[1] In Count I of their complaint petitioners sought mandatory injunctive relief for the removal of toxic waste which had accumulated on Respondent's property.[2] Petitioners originally filed their complaint in the Circuit Court of DuPage County, Illinois. Petitioners' state suit was removed from the Circuit Court to the District Court upon removal petition of Kerr-McGee on grounds of diversity pursuant to 28 U.S.C. §§1446, 1332 and 1441.

Petitioners, Donald Brown, Edith R. Brown[3] and Betty Wolsfeld, are the equitable and beneficial owners of two parcels of residential property located in West Chicago, Illinois whose back yards abut a forty-three acre facility owned and operation by Respondent, Kerr-McGee. Donald Brown presently resides in one of the residential homes.

This case involves a forty-three acre site ("site") owned by Respondent Kerr-McGee Chemical Corporation ("Kerr-

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[1] The Court of Appeals treated Kerr-McGee's motion to dismiss as one for summary judgment because Respondent submitted materials outside the pleadings in support of its motion to dismiss. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1237 n.2 (7th Cir. 1985).

[2] The Court of Appeals exercised jurisdiction over the District Court's interlocutory order pursuant to 28 U.S.C. §1292(a)(1).

[3] Mrs. Brown died during the pendency of this proceeding.

McGee") in West Chicago, Illinois, where from 1931 to 1973 Kerr-McGee and its predecessors milled and processed ores bearing thorium, a naturally-occurring radioactive element. During the time the plant operated, liquid waste was disposed of by discharge into onsite pits. This practice resulted in extensive contamination of area groundwater with a variety of the industrial chemicals used in the ore milling process. Solid wastes, i.e., ore sediments—also called "mill tailings"—were piled onsite, where approximately 1.2 million cubic feet remain awaiting disposal. In addition to these tailings, about 3 million cubic feet of plant building and equipment rubble remain onsite also waiting disposal.

Both the mill tailings and the rubble are radioactive, since they are contaminated with thorium and its radioactive daughter products; these materials therefore pose radiation hazards to people exposed to them. The mill tailings also pose environmental hazards unrelated to the radiation they emit because they are contaminated with residuals of the industrial chemicals used in the milling process. As rain and melting snow mix with the tailings, these chemicals leach out into groundwater and remain a continuing source of chemical groundwater pollution. In sum, the mill tailings onsite are contaminated with both radioactive and nonradioactive contaminants, and pose both radiation hazards and nonradiation hazards. All parties agree that the radioactive and nonradioactive contaminants are inextricably mixed.

Since 1956 the owner of the site has been licensed by the U.S. Nuclear Regulatory Commission ("NRC") and its predecessor agency, the U.S. Atomic Energy Commission, pursuant to the Atomic Energy Act of 1954, 42 U.S.C. §2011 *ff.* ("AEA"). That is because thorium, denominated "source material" by the AEA (42 U.S.C.

§2014[z]), is one of several kinds of radioactive material licensed and regulated by NRC under the statute.[4] In 1978 the AEA was amended by Title II of the Uranium Mill Tailings Radiation Control Act, P.L. 95-604, 92 Stat. 3022 ("UMTRCA"); UMTRCA specifically made uranium and thorium mill tailings, denominated "byproduct material" (42 U.S.C. §2014(e)(2)), also subject to NRC licensing and regulation.

UMTRCA requires that before a private mill owner's license terminates, the milling site must be decommissioned and the wastes disposed. 42 U.S.C. §2113. Accordingly, in 1979 and in subsequent years Kerr-McGee has made several applications to the NRC to clean up the site, all of them proposing to permanently bury the wastes, both the rubble and the tailings, on the site.

In May 1983 the NRC issued an environmental impact statement on Kerr-McGee's onsite burial proposal (called the Final Environmental Statement, or "FES"). The FES, which basically endorsed onsite disposal, was rejected by the NRC hearing board on the ground that it violated the requirements of the National Environmental Policy Act, 42 U.S.C. §4321 *ff.*, 20 NRC 1296 and 21 NRC 244. Recent submissions by the NRC Staff indicate that a new draft environmental statement is expected to be completed no earlier than June 1986 and a new final environmental statement is to be completed no earlier than February 1987.

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[4] The AEA does not regulate all types of radioactive materials—only those specified in the statute. All others are regulated exclusively by the States. A question exists as to whether the AEA is applicable to the site since the site originated its operation in 1933, twenty-one years prior to the enactment of the act.

Petitioners filed a complaint against Respondent alleging that the Kerr-McGee site has been and is a nuisance. Petitioners' cause of action is based solely on State statutory and common law tort theories.

The allegations in Petitioners' complaint can be summarized as follows:[5]

a. The buildings on the site are in such a state of disrepair as to constitute a nuisance,

b. Hazardous wastes dumped on the site include toxic chemicals such as, barium sulfate, sodium phosphate, ammonia, ethylenediominatelnaacetic acid, sulfuric acid, kerosene, hydrochloric acid and caustic soda,

c. Liquid wastes have permeated the soil, and have polluted the water table, Petitioners' well and nearby streams,

d. Pollutant runoff from Respondent's site has run on to and polluted Petitioners' property,

e. The site is rat infested and that the rats have invaded Petitioners' property,

f. That the current condition of the site violates numerous municipal and state ordinances and statutes, and regulations of the Illinois Department of Public Health,

g. These conditions have interferred with Petitioners' right to quiet use and enjoyment of their property and pose a health hazard to them.

Kerr-McGee filed a motion to dismiss a portion of the relief sought by Petitioners in Count I of their complaint alleging that federal law, the AEA, preempts any attempt

[5] Paragraphs a-g are a condensed description of the various allegations contained in Petitioners' complaint and are not verbatim quotes.

to obtain judicial injunctive relief predicated upon State and common law tort theories. The district court held that Petitioners' request for injunctive relief was preempted because the NRC has exclusive authority over the disposal of radioactive materials and that an injunction would interfere with the NRC's authority.

The Seventh Circuit in a divided opinion affirmed the decision of the district court. The NRC has been aware of the existence of this lawsuit since its inception. To date the NRC has never sought to intervene or indicate on the record that it has an interest in these proceedings which could be adversely affected.

One of the issues on appeal, which is not an issue before this Court, was whether the court of appeals had jurisdiction to hear the appeal. The court of appeals determined that it had jurisdiction pursuant to 28 U.S.C. §1292(a)(1) in part because there was nothing to:

> preclude a finding that the district court order will result in serious, perhaps irreparable, consequences that can be effectively challenged only by immediate appeal.

Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234, 1240 (7th Cir. 1985).

The irreparable consequences which justified the Seventh Circuit's exercise of appellate jurisdiction over an interlocutory order still exist and should be considered by this court in determining whether it will grant this petition to review this interlocutory issue.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *SILKWOOD v. KERR-McGEE CORP.*, 464 U.S. 238 (1984).

Recently, the United States Supreme Court rendered its decision in *Silkwood v. Kerr-McGee*, 464 U.S. 238, 104 S.Ct. 615 (1984). There, the administrator of the estate of a deceased laboratory analyst at a federally licensed Kerr-McGee facility brought an action under State law to recover for injuries to the decedent's person and property. Unlike the matter at bar, the cause of damage was directly ascribed to a radiation hazard, plutonium contamination. Here, no reference to radiological materials is made in Petitioners' Complaint. The *Silkwood* court reversed the denial by the Tenth Circuit of an award of punitive damages, holding that they were not preempted under federal law. In rejecting Kerr-McGee's preemption argument, which is similar to Kerr-McGee's argument in the instant case, the high court conducted an in-depth examination of the legislative history of the Atomic Energy Act with respect to the subject of the availability of judicial remedies. The high court's analysis is applicable to this controversy with respect to the availability of injunctive relief:

> *Congress assumed that state law remedies in whatever form they might take were available to those injured by nuclear incident.* This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters.

Silkwood v. Kerr-McGee, 464 U.S. 238, 104 S.Ct. 615, 625 (1984 emphasis supplied).

> Congress therefore disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured by exposure to hazardous nuclear materials.

Silkwood v. Kerr-McGee, 464 U.S. 238, 104 S.Ct. 615, 626 (1984). This Court's decision in *Silkwood*, *supra*, did not limit the type of remedies available to persons who claim they were injured by exposure to hazardous nuclear material. While the specific relief sought in *Silkwood* was punitive damages, the quoted language from the opinion indicates that no limits were to be imposed on the forms of relief available to claimants.

The Seventh Circuit's ruling which limits the remedies available to Petitioner is at odds with the spirit of this Court's decision in *Silkwood*, which declared that Congress intended that adequate remedies be available to those injured by exposure to hazardous nuclear material and that no limits existed on the form of available remedies. The basis of equitable relief is the lack of an adequate remedy at law. Judge Cudahy in his dissent indicated that the majority found "preemption much to easily" and that there was an inadequate basis in the record to support the majority's decision. Judge Cudahy correctly concluded that the majority's decision contradicted the clear intent of Congress and this Court's decision in *Silkwood* which indicated that states retain jurisdiction over nonradiation hazards. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1243-1247 (7th Cir. 1985).

Judge Cudahy's comments in his dissent are of special significance in light of the long precedent of this Court which encourages caution in finding preemption and favors deference to the traditional powers of the State. In determining whether State power has been preempted, it should

be recalled that long before *Silkwood*, the Supreme Court warned that any invasion of traditional local domains involves a delicate exercise of legislative policy. In ascertaining the scope of congressional legislative intent, due and proper regard must be accorded local interests before a preemptive effect can be recognized. See *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944). The intent of Congress to displace State power must be either clearly manifested and definitely expressed, or clearly implied. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, 336 U.S. 245, reh. den., 336 U.S. 970 (1949); *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79 (1939). The court hearing the matter must start with the assumption that historic policy or judicial powers are not to be superseded. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1941). Where, as here, State power is sought to be prohibited on a claim of inferred preemption attributable to the scope and purpose of federal legislation it must be clear that the federal provisions are inconsistent with those of the State before Federal courts are justified in thwarting State power. See *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942). In view of the difficulties encountered by the Seventh Circuit in reaching its decision and the clear impact of its ruling on an area of great national concern, review by this Court is necessary.

II.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *PACIFIC GAS AND ELECTRIC CO. v. STATE ENERGY RESOURCE CONSERVATION AND DEVELOPMENT COMMISSION*, 461 U.S. 190 (1983).

The majority's decision is also contrary to *Pacific Gas and Electric Co. v. State Energy Resource Conservation and Development Commission*, 461 U.S. 190 (1983). There the State of California had prohibited construction of nuclear power plants until the NRC approved a method for disposing of spent nuclear fuel. The statute was based on the asserted economic risks of nuclear generation unless the disposal problem was solved. Ruling that the NRC's authority is limited to the radiological safety aspects of nuclear power (*id.* at 205) and that States retain their authority over its nonradiological aspects (*id.* at 212), the Court upheld the California statute. The Court rejected the plaintiff's and the Government's (as *amicus curiae*) argument that the NRC should have the final choice about if and when nuclear plants are built, and acknowledged that States have the power, arising from their jurisdiction over nonradiation hazards, to veto a plant—i.e., to render ineffectual permission granted by the NRC for a company to construct a nuclear power plant. The Petitioners herein seek to do precisely the same thing—to veto, on permissible state law grounds, Kerr-McGee's choice of a disposal location and render ineffectual the NRC's permission (if it is granted) to use that location. Under *Pacific Gas & Electric Co.*, such a veto is a legitimate exercise of state authority. Thus, the Seventh Circuit's preclusion of State authorized judicial relief warrants scrutiny by the Court.

III.

THE COURT OF APPEALS' DECISION INVOLVES ISSUES OF GREAT PUBLIC IMPORTANCE REGARDING CONCURRENT REGULATION BY FEDERAL AND STATE GOVERNMENTS OVER THE OPERATION OF PRIVATE FACILITIES LICENSED BY THE NRC.

Respondent currently operates the site under license issued by the NRC for the decommissioning and disposal of radioactive materials presently located at the site. The mill tailings and other toxic wastes on the site are contaminated with both radioactive and nonradioactive contaminants, and pose both radiation and nonradiation hazards. The radioactive and nonradioactive contaminants are inextricably intermixed. The Seventh Circuit correctly noted that Petitioners seek to abate the nonradiation rather than the radiation hazards posed by Respondent's site. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1241 (7th Cir. 1985). Congress did not intend federal law to preempt State regulation of nonradioactive waste disposal. *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 620-621 n.4, 98 S.Ct. 2531, 2533-2534 n.4 (1978). No question exists as to the right of citizens under Illinois law to the equitable relief sought in this case compelling exhumation of hazardous waste. *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 426 N.E.2d 824 (1981). Thus the Seventh Circuit correctly concluded that a private plaintiff may rely on state law to obtain injunctive relief from nonradiation hazards. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1241 (7th Cir. 1985).[6] The court rational-

[6] Congress in 1977 reinstated state authority over the airborne radiation hazards of NRC-licensed materials. *Pacific Gas & Elec., supra*, 461 U.S. at 212, n. 25. This was accomplished by an amendment, P.L. 95-95, to the Clean Air Act, 42 U.S.C. §§7401*ff*. Given that the primary radiation hazard of mill tailings is radon, an air-

(Footnote continued on following page)

ized, however, that because the nonradioactive and radioactive wastes were "intermixed", an injunction ordering removal of the nonradioactive waste would necessarily include the radioactive waste. Such a result the court concluded would stand as an obstacle to the objectives of federal regulation of radiation hazards. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1242 (7th Cir. 1985).

This decision is also inconsistent with the Seventh Circuit's previous ruling in *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982). In that case the court concluded that the City of West Chicago, a Plaintiff thereto, could seek abatement of nonradiation toxic chemicals, a public nuisance, at the site if no actual conflict was established between the NRC's authority and the relief sought by the City. Petitioners herein seek removal of the same onsite chemicals which were the object of the City of West Chicago's complaint.[7] In its

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[6] *continued*
borne radioactive decay product of thorium and uranium, state regulatory authority now exists not only over the non-radiation hazards of Kerr-McGee's site but over its chief radiation hazard as well.

[7] The inconsistent rulings have posed dramatic consequences for the State of Illinois. The State of Illinois is presently litigating an action against Kerr-McGee in the Circuit Court of DuPage County, *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois, No. 80 CH 298. In that case the People in part seek the abatement of the same nuisance at the Kerr-McGee site that is the subject of the instant suit. The case is scheduled for trial in early March, 1986. After the Seventh Circuit's decision in *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234 (7th Cir. 1985) Kerr-McGee filed suit in federal district court to enjoin the State Court proceeding. *Kerr-McGee Chemical Corp. v. State of Illinois*, United States District Court for the North-

(Footnote continued on following page)

previous ruling the court correctly indicated that the City's complaint was directed at nonradiation hazards and that regulation of nonradiation hazards by the states and their political subdivisions has not been preempted. *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 582 (7th Cir. 1982), accord, *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983).

This ruling is consistent with § 2021(k) of the AEA which provides in part:

> [n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for the purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k).

This Court has consistently held that Congress intended to preempt only the regulation of radiological hazards. *Pacific Gas and Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *affirmed*, 405 U.S. 1035 (1972).

The only limit imposed by the court in the *State of Illinois* case was that no actual conflict could exist between the NRC's authority and the City's suit. *People of the State of Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 582 (7th Cir. 1982).

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[7] *continued*
ern District of Illinois, Eastern Division, No. 85 C 10068. The judge sitting in state court had refused to follow the Seventh Circuit's decision and Kerr-McGee's appeal to the Appellate Court was dismissed.

A decision has not yet been rendered in that case. This conflict between State and Federal governments, highlights the public importance of the instant case and raises supremacy clause issues.

The restriction imposed by the court in the *State of Illinois* case is consistent with this Court's proclamation in *Silkwood* that:

> But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Silkwood v. Kerr-McGee Corp., ____ U.S. ____, 104 S.Ct. 615, 626 (1984). The Seventh Circuit's opinion does not contain any basis to satisfy the criterion for preemption enunciated in *Silkwood*.

The error in the court's reasoning in the instant case is that it assumed that an actual conflict exists between the relief sought by Petitioners and the authority of the NRC. In fact no conflict presently exists and the court merely speculated that one may arise. The purpose of the common law, Illinois nuisance law, pollution standards and local building codes relied upon by Petitioners in their complaint is not to regulate the radiological hazards or nuclear safety aspects of the Kerr-McGee site. The fact that enforcement of these state and local laws may impact on how Kerr-McGee operates its business at the site is not conclusive that they are preempted. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1244 (7th Cir. 1985) (Judge Cudahy, dissenting).[8] A conflict which justifies pre-

[8] This Court has twice, in the past two years, allowed state regulation which has directly impacted on aspects of the nuclear industry that are regulated by the federal government. *Pacific Gas and Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

emption must be actual. The court may not fabricate a conflict where none actually exists. *Huron Portland Cement v. City of Detroit*, 326 U.S. 440 (1960). The conflict must be of the type that it makes it physically impossible for Kerr-McGee to comply with both federal and state regulations. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), *Silkwood v. Kerr-McGee*, 464 U.S. 238, 104 S.Ct. 615, 621, 626 (1985). Neither Kerr-McGee, the Seventh Circuit, nor the NRC has indicated that it would be impossible for Kerr-McGee to comply with both state and federal law to accomplish removal of the hazardous waste. The purpose of Petitioners' request for relief is not to interfere with the NRC's jurisdiction, but to deprive Kerr-McGee of its choice of onsite encapsulation.[9]

In the instant case no conflict justifying preemption exists. The purported conflict is merely speculative and not actual. In the FES the NRC recommended onsite encapsulation of the waste. However, the FES submitted by the NRC was rejected by the NRC hearing board. In supporting their decision, the Seventh Circuit majority stated that nothing could prevent residents of other states from utilizing injunctive relief to prevent the relocation of the waste from its current site to another state. *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1242 (7th Cir. 1985). However, this is mere conjecture and is an improper basis for a finding of preemption. Cf. *Huron Portland Cement v. City of Detroit*, 326 U.S. 440 (1960). Finally, there is nothing to indicate that Kerr-McGee, pursuant to a mandatory injunction, could not remove the toxic

[9] Kerr-McGee's preference to bury the waste on site appears to be motivated by the difference in cost to Kerr-McGee between onsite and offsite burial which is approximately $35,000,000.00 (FES pp. 3-23 to 3-24).

waste from its site while complying with both state and federal law. Since no irreconcilable conflict with the Federal statutory scheme exists, the abrogation of common law remedies, injunctive relief, on preemption grounds can not be justified. Cf. *Nadar v. Allegheny Airlines*, 426 U.S. 290, 297, 299 (1976).

The majority's opinion has impinged not only on the traditional rights of individuals to seek injunctive relief where no adequate remedy at law exists, but also on traditional State powers to regulate toxic waste.[10] The NRC has been exploring a solution for the wastes at the site since 1979, yet no immediate resolution appears possible. The immediate effect of the Seventh Circuit's decision is to divest the states of traditional powers to regulate local health concerns associated with nonradiological hazardous waste and force its citizens to suffer continuing exposure to these toxic wastes because of the NRC's inability to resolve the problem in a reasonably prompt fashion. Since the decision sought to be reviewed has the profound national effect of eliminating the possibility of judicial relief in a domain of great public concern it is imperative that this Court conduct a review of the decision.

[10] The public importance of the issues presented for review is underscored by the State of Illinois filing *amicus* briefs in support of Petitioners' position with the Seventh Circuit.

CONCLUSION

For the foregoing reasons, Petitioners, Donald E. Brown; Edith R. Brown; Edwin E. Brown; Betty Wolsfeld; and West Chicago State Bank, respectfully pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 84-1294

DONALD E. BROWN; EDITH R. BROWN; EDWIN E. BROWN; BETTY WOLSFELD; and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969,

Plaintiffs-Appellants,

v.

KERR-MCGEE CHEMICAL CORPORATION, a Delaware Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 C 6323—**Frank J. McGarr**, *Judge*.

ARGUED NOVEMBER 9, 1984—DECIDED JULY 18, 1985

Before WOOD and CUDAHY, *Circuit Judges*, and WISDOM, *Senior Circuit Judge*.*

WOOD, *Circuit Judge*. This case is yet another lawsuit concerning the approximately forty-three acres of land known as the Kerr-McGee West Chicago Rare Earths Facility. *See City of West Chicago v. United States Nuclear Regulatory Commission*, 701 F.2d 632 (7th Cir. 1983); *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982). This time we are asked to decide whether the Atomic Energy Act, as amended, 42 U.S.C. § 2011 *et. seq.*, preempts a request for a

* The Honorable John Minor Wisdom, *Senior Circuit Judge* for the Fifth Circuit, is sitting by designation.

state-law injunction to remove nonradioactive hazards when the nonradioactive and radioactive materials are inseparable. We hold that the federal law preempts plaintiffs' request that the district court order the defendant Kerr-McGee to move the waste material to another location.

I.

The Kerr-McGee property in West Chicago consists of an eight acre factory site, a twenty-seven acre storage and disposal site, and an eight acre intermediate site connecting the other two. From 1932 to 1973, Kerr-McGee and its predecessor companies used the factory area to process monazite ores containing thorium, a natural radioactive element, and then disposed of the solid and liquid wastes in the storage area. Kerr-McGee stopped processing monazite ores in 1973, but continues, under license from the Nuclear Regulatory Commission ("NRC"), to possess and store thorium ores at the West Chicago site. Pursuant to a July 1977 order of the NRC, Kerr-McGee has submitted to the NRC a proposed plan for decommissioning the inactive West Chicago site and for disposing of the contaminated materials. On May 27, 1983, the NRC issued its Final Environmental Statement ("FES"), which outlined eight alternative proposals and recommended that the buildings be razed and the wastes be encapsulated and stored on the site for an indeterminate time period. The Commission subsequently authorized the Atomic Safety Licensing Board ("ASLB") to hold a hearing on the FES — as requested by the Illinois Attorney General.

Plaintiffs-appellants Donald E. Brown, Edith R. Brown, and Betty Wolsfeld are the equitable and beneficial owners of two parcels of residential property whose backyards abut the Kerr-McGee site. Plaintiffs rent the 904 Joliet Street residence to Mr. and Mrs. R. Gill, and Donald Brown and his mother Edith reside at 914 Joliet Street.

Plaintiffs brought this action on a variety of state law tort theories. Plaintiffs allege that the buildings on the Kerr-McGee property are in such a state of disrepair as to constitute a public and private nuisance.[1] In addition, plaintiffs claim that rats from the disposal site have entered the Browns' backyard and made numerous holes. The plaintiffs also allege that the wastes dumped in the storage area include hazardous chemicals such as barium sulfate, sodium phosphate, ammonia, ethylenediaminetetraacetic acid, sulfuric acid, and kerosene. According to plaintiffs, the liquid wastes deposited in ponds at the disposal site by Kerr-McGee and its predecessors have permeated the soil and polluted the water table. The water table is further polluted, plaintiffs allege, as rain and melting snow percolate through the mounds of solid waste and thereby become contaminated. Plaintiffs claim that the underground waters near the Kerr-McGee site exceed the water pollution standards set by the Illinois

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[1] The plaintiffs allege that the current conditions existing in the factory area include:

a) open pits filled with refuse and chemicals;

b) holes in floors two through four of building 9, averaging three feet in diameter;

c) loose glass in windows;

d) broken glass on pavement below windows;

e) boards off windows;

f) animal litter scattered throughout the buildings;

g) fallen walls, debris, abandoned equipment, and chemicals;

h) fallen, collapsed, and sagging roofing; and

i) scattered empty beer cans, bottles, and other litter.

Plaintiffs further claim that the area is accessible to the "public in general and children in particular through and over fences," and has "inadequate security and lighting."

Pollution Control Board. Donald Brown also stated at his deposition that rain drains off the waste piles and into his yard.

Plaintiffs' complaint requested three types of relief. Count I sought an injunction ordering Kerr-McGee to repair or destroy the existing structures on the property and to remove all the hazardous wastes to some other location. Count II sought compensatory damages, and count III sought compensatory and punitive damages. Kerr-McGee, offering affidavits that all the wastes are radioactive and arguing that federal law preempts a state-law injunction, moved for dismissal of that part of count I requesting that the wastes be removed and stored at some other location. The district court agreed that federal law preempted such relief and granted partial summary judgment for defendant Kerr-McGee.[2] Plaintiffs appealed the summary judgment order to this court.

II.

We first consider whether the district court order granting partial summary judgment for defendant on count I is appealable. The order is obviously not final, and the district court did not certify the issue under 28 U.S.C. §1292(b). Appellants argue, however, that this court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the summary judgment had the practical effect of denying plaintiffs' request for permanent injunctive relief. We agree.

Section 1292(a)(1) provides that appellate courts have jurisdiction of interlocutory district court orders

[2] Although the defendant phrased its motion as one to dismiss part of the complaint, the defendant submitted a copy of the FES, two affidavits, and portions of deposition testimony in support of its motion. Since the district court relied on at least the FES, we treat the motion as one for summary judgment. Fed. R. Civ. P. 12(c).

"granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (1982). The plaintiffs never moved for an injunction, but an order having the practical effect of denying an injunction is considered a denial of an injunction for purposes of section 1292(a)(1). *See Carson v. American Brands, Inc.*, 450 U.S. 79, 83-84 (1981); *Data Cash Systems, Inc. v. JS&A Group, Inc.*, 628 F.2d 1038, 1040 (7th Cir. 1980). Here the plaintiffs' complaint sought injunctive relief in count I and damages in counts II and III. By granting partial summary judgment in favor of the defendant on plaintiffs' request that the wastes be moved elsewhere, the court denied the plaintiffs part of the injunctive relief they sought; thus the court's order constitutes a denial of an injunction for purposes of section 1292(a)(1). *See Plymouth County Nuclear Information Committee, Inc. v. Boston Edison Co.*, 655 F.2d 15, 17 (1st Cir. 1981).

Prior to the Supreme Court's decision in *Carson*, a finding that the summary judgment had the practical effect of denying an injunction would end our inquiry and we would take jurisdiction. *See Data Cash Systems, Inc.*, 628 F.2d at 1040; *cf. South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984). *Carson*, however, requires more. In *Carson*, the Court held that an interlocutory order of a district court is immediately appealable under section 1292(a)(1) only if the appellant demonstrates that the order has a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal. *Carson*, 450 U.S. at 84 (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955)). Although this two-part test seems straightforward, there is some disagreement — both among circuits and within this circuit — as to whether *Carson* applies when the interlocutory order addresses the merits of the claim.

In *Carson*, a discrimination case, the Supreme Court held that an appeal lay from a district court order denying a joint motion of the parties to approve and enter a negotiated consent decree. The Court decided that, be-

cause the order would cause the plaintiffs to lose both their right to settle the case and any job opportunities that might arise under the consent decree, the order had " 'serious, perhaps irreparable, consequences' that petitioners [could] 'effectually challenge' only by an immediate appeal." 450 U.S. at 90.

Carson has raised some questions because, although the Supreme Court states that the "serious, perhaps irreparable, consequences" test is applicable to interlocutory judgments appealed under section 1292(a)(2), *id.* at 84, the Court relies primarily on cases in which the interlocutory orders were not decisions on the merits of the appellants' claims. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (order denying class certification); *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966) (appellants sought interlocutory review of district court's denial of appellants' motion for summary judgment); *Baltimore Contractors*, 348 U.S. at 177 (district court order refusing to stay a state court accounting action pending arbitration). Consequently, several courts, including a panel of this circuit, have read *Carson* narrowly to apply only to interlocutory orders that did not reach the merits of appellants' claims or did not dispose of all requests for injunctive relief. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 260-61 (7th Cir. 1984); *Center for National Security Studies v. Central Intelligence Agency*, 711 F.2d 409, 412 (D.C. Cir. 1983); *Tokarcik v. Forest Hills School District*, 665 F.2d 443, 446-47 (3rd Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982). These courts rely on *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932), for the rule that an interlocutory order disposing of all requests for injunctive relief and addressing the merits of the case is immediately appealable under section 1292(a)(1) and *Gardner* and *Carson* for the proposition that an order either not disposing of all requests for injunctive relief or not addressing the merits is immediately appealable only if the appellant shows a "serious, perhaps irreparable, consequence" that can be effectually

challenged only by immediate appeal. *See Winterland Concessions*, 735 F.2d at 261 (citing *Gardner*, 437 U.S. at 481); *Center for National Security Studies*, 711 F.2d at 412-13 & n.6; *see also Gardner*, 437 U.S. at 481 n.7 ("There is an important distinction between an order denying an injunction on the merits and 'one based on alleged abuse of a discretionary power over the scope of the action.' ") (quoting *Stewart-Warner Corp. v. Westinghouse Electric Corp.*, 325 F.2d 822, 829 (2nd Cir. 1963) (Friendly, J., dissenting)).

Other courts, including a different panel of this circuit, have held that *Carson* prescribes a broad rule applicable to all appeals under section 1292(a)(1) — whether or not the district court addressed the merits of the appellant's claim. *See Carson*, 450 U.S. at 84; *South Bend Consumers Club*, 742 F.2d at 393-94; *see also United States v. RMI Co.*, 661 F.2d 279, 281-82 (3rd Cir. 1981); *Gould v. Control Laser Corp.*, 650 F.2d 617, 621 (5th Cir. 1981). This position is supported by the Supreme Court's suggestion in *Carson* that each of the prior cases on appellate jurisdiction under section 1292(a)(1) could be explained in terms of the "serious, perhaps irreparable, consequences" requirement. *Carson*, 450 U.S. at 84-86; *see Donovan v. Robbins*, 752 F.2d 1170, 1173-74 (7th Cir. 1985). Indeed, the Court even suggested that *Marvel*, the case now used as the basis for the "merits" distinction, reflected a finding by the Court that "serious, perhaps irreparable, consequences" would have resulted without an immediate appeal. *Carson*, 450 U.S. at 86 n.11; *see also Shirey v. Bensalem Township*, 663 F.2d 472, 477 (3rd Cir. 1981).

We need not resolve these inconsistencies, however, because in the present case the two analyses yield the same result. The courts adopting the "addressing the merits" approach have held that an interlocutory order denying, on the merits, a request for an injunction is immediately appealable under section 1292(a)(1) only if the order disposes of all pending requests for injunctive relief. *See Winterland Concessions*, 735 F.2d at 261. If

some requests for injunctive relief are still pending in the district court, the appellant must show that the interlocutory order will cause serious, perhaps irreparable, consequences that can be effectually challenged only by immediate appeal. *See Center for National Security Studies*, 711 F.2d at 413. In the present case, the district court granted summary judgment for the defendant with respect to plaintiffs' request for an injunction ordering the wastes removed to "some other safe and distant location," but the court did not decide whether plaintiffs are entitled to the other requested injunctive relief. Thus, even though the district court addressed the merits of plaintiffs' claim for an injunction ordering removal of the wastes, the *Winterland Concessions* approach would require plaintiffs to show that the interlocutory order will result in serious, perhaps irreparable, harm. Since, as we noted above, the *South Bend Consumers Club* approach requires a showing of serious, perhaps irreparable, consequences for any appeal under section 1292(a)(1), *see* 742 F.2d at 393-94, in this case both interpretations of *Carson* will yield the same result.

In the present case, the depositions and the Final Environmental Impact Statement support plaintiffs' contention that toxic wastes at the Kerr-McGee site have contaminated their land. Plaintiffs-appellants further claim that such contamination has adversely affected their health. Since in reviewing a summary judgment we view all pleadings and supporting papers in the light most favorable to the non-moving party, *see Trulson v. Trane Co.*, 738 F.2d 770, 771 (7th Cir. 1984), we assume that detrimental health effects will result between now and the district court's final decision. *Cf. RMI Co.*, 661 F.2d at 282 (no continuing harm during trial). Furthermore, according to plaintiffs, every rainfall or melting snow flushes more of the toxic wastes into their water supply. These effects, because they are more than compensable economic losses, *cf. South Bend Consumer Club*, 742 F.2d at 394, are serious, perhaps irreparable, consequences that plaintiffs

can effectually challenge only by immediate appeal.[3] *See Carson*, 450 U.S. at 86-90 (lost job opportunities constitute serious, perhaps irreparable, harm).

Citing *Plymouth County Nuclear Information Committee, Inc.*, 655 F.2d at 18, defendant Kerr-McGee argues that plaintiffs' failure to seek a preliminary injunction precludes a finding that serious or irreparable harm will result pending the district court's final decision. We agree that a party's failure to seek preliminary injunctive relief is a good indication that the status quo can be maintained until the ultimate conclusion of the litigation. *See South Bend Consumers Club*, 742 F.2d at 394. But "a good indication" is not a conclusive bar to interlocutory appeal. *See Kartell v. Blue Shield of Massachusetts, Inc.*, 687 F.2d 543, 553 n.21 (1st Cir. 1982). In *Plymouth County*, the plaintiff waited nearly a year and a half between the denial of its motion for a preliminary injunction and its appeal of the dismissal of that part of the complaint requesting injunctive relief. 655 F.2d at 17-18. In *South Bend Consumers Club*, the appellant delayed requesting a preliminary injunction. 742 F.2d at 394. Thus in both cases the parties' actions implied that no serious harm would occur without a preliminary injunction.

The present case differs in that here preliminary injunctive relief was impractical. Plaintiffs claim that the toxic wastes on Kerr-McGee's property have caused, and continue to cause, serious, perhaps irreparable, harm to

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[3] Although *Carson* requires both that the order cause "serious, perhaps irreparable, consequences" and that the order can be "effectually challenged" only by immediate appeal, the Supreme Court found the second prong satisfied in *Carson* because the serious, irreparable consequences could result between the time of the interlocutory order and the district court's final decision. Because the irreparable effects could result between the summary judgment and the appeal from the final judgment in the present case, an appeal from the final judgment may not provide plaintiffs adequate relief from the intervening harm. Thus the order can be effectually challenged only by immediate appeal.

plaintiffs' health and to their property. If Kerr-McGee were still creating and dumping toxic wastes on the site, plaintiffs could request a preliminary injunction enjoining Kerr-McGee from further dumping. But plaintiffs admit that Kerr-McGee has not operated the factory since 1973, and it would be irrational for a district court to enter a *preliminary* injunction ordering Kerr-McGee to remove all toxic wastes from the West Chicago site. *See Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1360 (2nd Cir. 1976) (purpose of a preliminary injunction is to maintain the status quo, not to give the moving party affirmative relief equivalent to the ultimate relief sought). Consequently, in the unusual circumstances of this case, we believe that plaintiffs' failure to request preliminary injunctive relief does not preclude a finding that the district court order will result in serious, perhaps irreparable, consequences that can be effectually challenged only by immediate appeal. We believe that appellants have met their burden to prove such consequences and we therefore find the order appealable under section 1292(a)(1).

III.

The district court held that plaintiffs' request for an injunction ordering that the wastes be removed and stored elsewhere was preempted because such an order would conflict with the Commission's exclusive authority over the disposal of radioactive materials. Plaintiffs and amicus State of Illinois, relying on *Illinois v. Kerr-McGee* and 42 U.S.C. § 2021(k), argue that federal law preempts state regulation of *radiation hazards* but not state regulation of *nonradiation hazards*. Furthermore, appellants argue, since Illinois law permits a court to order exhumation of hazardous wastes, *see Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 31-36, 426 N.E.2d 824, 839-41 (1981), the district court can find that the nonradiation hazards of the Kerr-McGee wastes justify the removal of the wastes to another site. We disagree, however, and hold that when the radiation and nonradiation hazards

are inseparable, federal law preempts a state-law injunction ordering removal of the wastes.

State law, and thus state law remedies, are preempted if federal law so pervades a given field as to evidence a congressional intent to occupy that field. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615, 621 (1984). Even if Congress has not entirely displaced state law in a field, state law is still preempted if an "actual conflict" exists between state and federal law. *Id.* Such a conflict occurs "when it is impossible to comply with both state and federal law" or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.*

When a state regulation concerns an activity involving radioactive materials, the preemption issue normally turns on whether the state is regulating radiation or nonradiation hazards. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1149-54 (8th Cir. 1971) (radiation hazards), *aff'd* 405 U.S. 1035 (1972); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 247, 237 N.W.2d 266 (1976) (nonradiation hazards). This distinction is reflected by the language of section 274(k) of the Atomic Energy Act ("AEA"), which states:

> (k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2021(k) (1982).[4] Thus the AEA preempts a

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[4] Although this provision applies only to the preemptive effect of section 274, the Supreme Court has interpreted section 274(k) as a reflection of the general distinction between federal and state authority to regulate activities covered by the Atomic Energy Act, as amended. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 210 (1983).

state attempt to impose more stringent limitations on the radioactive effluents of a nuclear power plant. *See Northern States Power*, 447 F.2d at 1147-50. By contrast, states retain the power to determine the need for additional electrical capacity and they may choose not to build a nuclear power plant for economic reasons. *See Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205-08 (1983). Analogously, a private plaintiff may rely on state law to obtain injunctive relief from nonradiation hazards that do not involve radiation hazards. *Illinois v. Kerr-McGee*, 677 F.2d at 582.

If the nonradiation hazards at the Kerr-McGee site were separable from the radiation hazards, plaintiffs could maintain an action to have the nonradioactive wastes removed "to some other safe and distant location." *See Village of Wilsonville*, 86 Ill. 2d at 35-36, 426 N.E.2d at 841. Congress clearly did not intend federal law to "occupy the field" of nonradioactive hazardous waste disposal. *See* 42 U.S.C. § 6929 (1982); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620-21 n.4 (1978). Furthermore, because the plaintiffs seek to abate the nonradiation rather than the radiation hazards, removal of separable, nonradioactive material would not cause a conflict between state and federal law. *See Illinois v. Kerr-McGee*, 677 F.2d at 582. Our analysis is made somewhat more complex because, as both parties agree, the radioactive and nonradioactive materials are "inextricably intermixed."

In this case, we find no explicit congressional intent or pervasive federal scheme that preempts the state laws relied on by plaintiffs. When Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. *Silkwood*, 104 S. Ct. at 621. Thus the AEA, which provides a pervasive scheme for regulating radioactive materials, preempts any state regu-

lation of radiation hazards.[5] *Northern States Power Co.*, 447 F.2d at 1147-50. But while an Illinois law regulating radiation hazards would be void, *see Commonwealth Edison Co. v. Pollution Control Board*, 5 Ill. App. 3d 800, 801, 284 N.E.2d 342, 342 (1972), the laws relied on by plaintiffs are undoubtedly valid in some circumstances. These laws do not regulate radiation hazards but instead concern pollution standards, building codes, and public nuisance. Indeed, as we held in *Illinois v. Kerr-McGee*, plaintiffs can bring an action based on these laws against Kerr-McGee as long as the remedy involves no radioactive materials. 677 F.2d at 582.

Nonetheless, plaintiffs' request for injunctive relief is still preempted if a conflict exists between state and federal law. To determine whether a conflict exists, we must look to the facts of the case. *Illinois v. Kerr-McGee*, 677 F.2d at 581. The wastes at the West Chicago site, because they consist of "the tailings or wastes produced by the extraction or concentration of . . . thorium from any ore processed primarily for its source material content," constitute "byproduct material" under the Atomic Energy Act, as amended by the Uranium Mill Tailings Radiation Control Act. 42 U.S.C. § 2014(e)(2); *see* FES, at H-4, H-5 ("[A]t least 60% of the monazite ore was processed primarily for its source material content and the resulting tailings and wastes are clearly byproduct material."). The NRC has exclusive authority to regulate the radiation hazards of the byproduct material[6] and Kerr-McGee must obtain a license from the NRC for decommissioning the West Chicago site and disposing of the wastes. *See* 42 U.S.C. § 2113-14.

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[5] States may assume responsibility for the regulation of some radiation hazards by entering an agreement with the NRC. 42 U.S.C. § 2021(b). This provision is not applicable here, however, since Illinois has not entered such an agreement.

[6] As noted above, Illinois has not entered an agreement with the NRC to regulate the radiation hazards of byproduct material. *See* 42 U.S.C. § 2021(b).

Plaintiffs asked the district court to order Kerr-McGee to remove the wastes to "some other safe and distant location." Plaintiffs and amicus argue that the inseparability of the materials should not alter the analysis of *Illinois v. Kerr-McGee*; they suggest that the district court can find that the nonradiation hazards violate Illinois pollution laws and can order Kerr-McGee to move the wastes to some site that both satisfies Illinois pollution standards and meets the licensing standards of the Nuclear Regulatory Commission. This argument reads *Illinois v. Kerr-McGee* too broadly. In that case, we held only that, with respect to the nonradiation hazards, the City of West Chicago could "pursue its own remedies only to the extent that they do not conflict with NRC regulation of radiation hazards." 677 F.2d at 584.

In the Final Environmental Statement for the Kerr-McGee site, the NRC staff analyzed eight different disposal alternatives and recommended on-site encapsulation as the best alternative. Although the Commission has not yet decided which alternative to license, an injunction ordering Kerr-McGee to remove the byproduct material from the West Chicago site would, in effect, substitute the judgment of the district court for that of the NRC as to whether on-site encapsulation is the best method of storing this byproduct material. True, the injunction sought by plaintiffs would not order the NRC to license a *specific* waste disposal site, but it would prevent the NRC from choosing the site recommended by the NRC staff. Furthermore, if federal law does not preempt plaintiffs' request for an injunction, nothing prevents neighbors of other prospective sites from relying on state law to obtain injunctions preventing NRC consideration of those locations. Such state law remedies, though not attempts to regulate the *radiation* hazards of byproduct material, nonetheless interfere with the NRC's ability to choose the method of disposal that, in light of radiation, nonradiation, and economic considerations, is the most appropriate. We therefore hold that plaintiffs' request for an injunction ordering the Kerr-McGee wastes moved elsewhere is pre-

empted because, if granted, the injunction would stand "as an obstacle to the accomplishment of the full purposes and objectives" of federal regulation of radiation hazards. *Silkwood*, 104 S. Ct. at 621.

Our holding does not leave plaintiffs without a remedy. *Cf. Silkwood*, 104 S. Ct. at 623; *Illinois v. Kerr-McGee*, 677 F.2d at 583. Congress instructed the NRC to ensure "that the management of any byproduct material . . . is carried out in such a manner as . . . the Commission deems appropriate to protect the public health and safety and the environment from *radiological* and *nonradiological* hazards" associated with the possession of byproduct material. 42 U.S.C. § 2114(a)(1) (emphasis added); *see also* 42 U.S.C. § 2114(c) (licensee may propose alternatives to Commission's requirements, but Commission may accept alternatives only if they will achieve an equivalent or greater level of safety). The Commission must also ensure that the approved disposal plan conforms with the standards set by the Environmental Protection Agency for the protection of the public health and the environment from the radiation and nonradiation hazards associated with the disposal of byproduct material. *See* 42 U.S.C. § 2114(a)(2); *see also* 42 U.S.C. § 2022(b)(1); Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings, 40 C.F.R. §§ 192.40-42 (1984). In the present case, the NRC staff has evaluated the radiation and nonradiation hazards of the eight alternatives, weighed these hazards against the costs of the alternatives, and recommended on-site encapsulation of the wastes. At the hearing on the FES, the plaintiffs may try to convince the NRC that, for reasons related to either *radiation* or *nonradiation* hazards, the West Chicago site is unfit for storing the byproduct material. If plaintiffs decide that participating in the upcoming hearing is too expensive, they can rely on the State of Illinois and the City of West Chicago, who will participate, to represent their interests.

For the foregoing reasons, plaintiffs' request for injunctive relief ordering Kerr-McGee to remove the mill

tailings and other wastes to "some other safe and distant location" is preempted by federal law.[7] The order of the district court is

AFFIRMED.

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[7] In his dissent, Judge Cudahy suggests that our holding cannot be valid after *Silkwood*. The *Silkwood* decision was based on legislative history that revealed a congressional intent to allow plaintiffs to recover damages for injuries caused by nuclear hazards. 104 S. Ct. at 622-25. Even in allowing the recovery of punitive damages, however, the Supreme Court suggested that federal law would preempt a state law damage award if the award caused an irreconcilable conflict between state and federal standards or if the imposition of a state standard would frustrate the objectives of the federal law. *Id.* at 626. Here, although the request is based on state regulation of nonradioactive hazards, an injunction ordering the wastes moved to some other location frustrates the objectives of federal law by preventing the NRC from choosing what may be the most appropriate method of storing this radioactive material. Therefore the request for an injunction is preempted.

In addition, Judge Cudahy's second footnote suggests that he may have read our holding too broadly. This appeal concerns only the plaintiffs' request for an injunction ordering the removal of the radioactive material from the West Chicago site. The plaintiffs may be able to obtain injunctive relief that does not require the removal of radioactive materials (*e.g.*, erection of fences to prevent entry, extermination of rats). Moreover, once the NRC licenses a site, the state may regulate the nonradiation hazards so long as that regulation does not create an irreconcilable conflict or frustrate the objectives of the federal law. But neither of these issues has been tried or is before us. For today we hold only that federal law preempts a nonagreement state, *see supra* notes 5-6, or a plaintiff relying on state law from obtaining an injunction ordering the removal of radioactive wastes to some other site.

CUDAHY, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the analysis of the majority in section II of its opinion, in which it reasons that the district court order granting summary judgment on that portion of the complaint which seeks an injunction requring Kerr-McGee to remove wastes from the West Chicago site is appealable, and that therefore this court has jurisdiction.

However, the majority finds preemption much too easily in section III. We are faced here with a situation in which legitimate concerns of the states and local residents may be ignored by the Nuclear Regulatory Commission. In this whole field Congress has been very reluctant to override state prerogatives. I do not think the courts should crash through the tangled thicket of waste disposal, and in the process upset the balance achieved by Congress between state and federal law.[1]

It is important, I believe, to begin by recognizing that this is not an action to force reduction in levels of radiological hazards as such. As the majority recognizes, the plaintiffs' action is based on state law concerning pollution standards, building codes and public nuisances. The majority also concedes that none of these fields of state regulation are preempted by the Atomic Energy Act. Further, since the suit is based on these grounds, I think *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984), and *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), not to mention this court's recent decision in *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982), are more apposite than *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *summarily aff'd*, 405 U.S. 1035 (1972). Indeed, it seems to me that *Silkwood* requires that we find no preemption here.

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[1] Whether Congress's reluctance to preempt is sound public policy for the long run is not for us to decide. It is abundantly clear to me, however, that Congress has been reluctant.

It is also important that we recognize, as the district court apparently did not, the nature of the proceedings presently pending before the NRC. *See generally* Kerr-McGee App. 22-32. Kerr-McGee is required to seek amendment of the license under which it operates the West Chicago site. It is presently asking the *permission* of the NRC to undertake its preferred course of disposal of the wastes in question, on-site encapsulation. Even if the NRC approves that application, it will only be permission for Kerr-McGee to so dispose of the wastes. Kerr-McGee will not be *required* to do so, and there appears to be nothing other than Kerr-McGee's economic interest which prevents it from applying to the NRC for permission to dispose of the wastes in a manner which complies with both federal *and* state law.

There is little doubt that state regulation of the radiation hazards associated with nuclear power generation is preempted by federal regulation, *Northern States Power*, 447 F.2d 1143, because "the Federal Government has occupied the entire field of nuclear safety concerns," *Pacific Gas & Electric*, 461 U.S. at 212, *see Silkwood*, 104 S. Ct. at 617. *Cf. Pacific Gas & Electric*, 461 U.S. at 205 (state regulation of "radiological safety aspects involved in the construction and operation of a nuclear plant" is preempted); *id.* at 223-29 (Blackmun, J. concurring) (state safety regulation not wholly preempted). However, Congress intended to preempt only the regulation of radiological hazards. *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*, 659 F.2d 903, 923 (9th Cir. 1981), *aff'd sub nom. Pacific Gas & Electric*, 461 U.S. 190 (1983); *Northern States Power*, 447 F.2d at 1149-50. *See also Pacific Legal Foundation*, 659 F.2d at 923 n.32 (collecting cases holding same). "[T]he States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, *land use*, ratemaking, and the like." *Pacific Gas & Electric*, 461 U.S. at 212 (emphasis supplied; footnote omitted). This is in accord with the language of section 274(k) of the Atomic Energy Act, which permits the states "to regulate activities for pur-

poses other than protection against radiation hazards." 42 U.S.C. § 2021(k). *See Pacific Gas & Electric*, 461 U.S. at 210.

The purpose of the state regulation is critical in determining whether the regulation is preempted. *Pacific Gas & Electric*, 461 U.S. at 213-16; *Silkwood*, 104 S. Ct. at 631 (Blackmun, J. dissenting). There is no claim here that the purpose of Illinois' nuisance law, building codes and pollution standards is to regulate the radiological hazards or nuclear safety aspects of nuclear fuel processing. Therefore these are not preempted by the Atomic Energy Act and the subsequent federal regulation. *Pacific Gas & Electric*, 461 U.S. at 216 ("[W]e accept California's avowed economic purpose as the rationale for enacting § 25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation." (footnote omitted)). The fact that enforcement of these state laws may impact on how Kerr-McGee carries out its business at the West Chicago site is not conclusive that they are preempted. Indeed, the Supreme Court has twice in the past two terms allowed state regulation which has directly impacted on aspects of the nuclear industry that are regulated by the federal government.

In *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), the Court held that a California statute which prohibited the construction of any nuclear generating plants until a method for disposal of radioactive wastes was approved by the NRC was not preempted. The statute was based on the supposed possible economic unviability of nuclear generation of electricity unless such a disposal method was developed. Although the statute was based on economic considerations, which have long been regulated by the states, the statute gave the state an effective veto over the construction of any nuclear generating stations within its borders until certain safety issues were dealt with by the federal government. Since the purpose of the state statute was economic not radiation safety, it was not preempted, 461 U.S. at 216, even though it had an effect

on the radiation hazards to which the people of California were exposed.

Just last year the court went even further when it decided *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984). In *Silkwood* the Court upheld a state-authorized award of punitive damages for injuries caused by nuclear hazards even though the NRC was vested with exclusive regulatory authority over the safety aspects of nuclear development and there had been no significant violation of the federal safety standards. 104 S. Ct. at 619, 626. Punitive damage awards have a clear impact on federal safety standards, for in effect they set independent state safety standards. *See Silkwood*, 104 S. Ct. at 628-30 (Blackmun, J. dissenting); *id.* at 635 (Powell, J. dissenting). Yet the Court held that the award of punitive damages was not preempted. If punitive damages for violating a jury-imposed standard of radiological safety are not barred, then clearly injunctive relief based on state laws not having as their purpose the imposition of radiological safety standards cannot be preempted.

The majority makes much of the fact that the radioactive and nonradioactive materials are "inextricably intermixed," arguing that because of this inseparability state regulation of the nonradioactive materials is preempted by federal regulation of the radiological safety aspects of the radioactive material. While this argument might have some plausibility as an initial matter, it cannot be valid after *Silkwood*. Karen Silkwood was contaminated with plutonium from a Kerr-McGee processing plant. As the majority surely knows, plutonium is itself a radioactive material. The punitive damages awarded by the jury were to penalize the company for its conduct which allowed the release of this very material. On the majority's theory, these punitive damages are preempted, for if material *is* radioactive, then any nonradioactive aspects are "inextricably intermixed" with its radioactive aspects. Yet the Supreme Court held that the punitive damages were not preempted by the NRC's regulation of the safety aspects of the production of

plutonium. *A fortiori* state regulation for otherwise permissible purposes of material that is not radioactive cannot be preempted even when the material is "inextricably intermixed" with radioactive material.

The majority notes that the NRC is currently considering a number of alternative sites for disposing of the wastes presently at the West Chicago site. The majority then speculates that individuals residing adjacent to these other sites or state authorities *might* bring injunctive actions similar to this one, and jumps to the conclusion that therefore *this* action is preempted. This approach is simply inadmissible. The majority is correct to be aware of the *possibility* of this conflict, in which the several states bar each of the options approved or considered by the NRC. But so far this conflict is possible, not actual, and it is sheer speculation to conclude that it will ever transpire. Currently there is no conflict between the federal and state schemes because it is not "physically impossible" for Kerr-McGee to comply with both. *Silkwood*, 104 S. Ct. at 626; *Pacific Gas & Electric*, 461 U.S. at 204; *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). A court should not delve into hypothetical situations seeking out conflicts where none clearly exist. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130-31 (1978); *see Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960).

This court has recognized these very principles in *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982). In that case we stated that there must be "a direct conflict between federal and state law that *cannot* be reconciled. Courts are not to seek out conflicts *where none necessarily exist*, ..." 677 F.2d at 579 (citations omitted: emphasis supplied). With all respect, it seems to me that the majority is seeking out a conflict where one does not necessarily exist in order to bolster its shaky argument for preemption. All Kerr-McGee need do in order to preclude any conflict is to request NRC permission for a disposal alternative which satisfies state law. Further, the hypothetical conflict

postulated by the majority is one in which the state law might prohibit something the NRC would merely permit. "This sort of hypothetical conflict is not sufficient to warrant pre-emption." *Exxon Corp.*, 437 U.S. at 131. *See Pacific Gas & Electric*, 461 U.S. at 218-19 ("Because the NRC order does not and could not compel a utility to develop a nuclear plant, compliance with both it and § 25524.2 [the state statute] is possible."). I therefore conclude that the injunctive relief requested by plaintiffs is not preempted.

However, it does not follow from the fact that the requested injunctive relief is not preempted that it would be proper to grant that relief at this time. I believe that this is an apt and proper case for application of the doctrine of primary jurisdiction. The question underlying the plaintiffs' request for injunctive relief—whether the mill tailings material should be disposed of at the West Chicago site or elsewhere—is presently pending in the NRC administrative proceeding. The State of Illinois is one of the parties to that proceeding and has advanced the same position asserted by plaintiffs here. There is no contention that the state has not been adequately representing the plaintiffs' interests.

Primary jurisdiction is a common law doctrine dating back at least to *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). Primary jurisdiction

> applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 64 (1956). The Supreme Court has explained the reasoning underlying primary jurisdiction as follows:

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. United States, 342 U.S. 570, 574-75 (1952). *See also Bradford School Bus Transit, Inc. v. Chicago Transit Authority*, 537 F.2d 943, 949 (7th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); *see generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 22 (2d ed. 1983); B. SCHWARTZ, ADMINISTRATIVE LAW 481-497 (1976).

Primary jurisdiction is applicable here. There are currently proceedings pending before the NRC concerning Kerr-McGee's application for a license for on-site encapsulation of the materials now located at the West Chicago site. The NRC is considering eight disposal alternatives. There is a possible, though not yet any actual, conflict between NRC recommendations and state law. Most important, the NRC presumably has some specialized knowledge and expertise in this field. Finally, I note that several other courts have applied the doctrine of primary jurisdiction in closely analogous situations when NRC proceedings were pending. *See, e.g., Honicker*

v. Hendrie, 465 F. Supp. 414, 419 (M.D. Tenn. 1979), *aff'd mem.*, 605 F.2d 556 (6th Cir.), *cert. denied*, 444 U.S. 1072 (1980); *Paskavitch v. United States Nuclear Regulatory Commission*, 458 F. Supp. 216 (D. Conn. 1978); *Nader v. Ray*, 363 F. Supp. 946, 953 (D.D.C. 1973).

The State of Illinois argues as *amicus* that primary jurisdiction is not applicable here because the plaintiffs' claims are based on state law and the NRC cannot enforce the relief requested. This argument is beside the point because primary jurisdiction is applicable even though the agency cannot grant the relief requested. *See United States v. ICC*, 337 U.S. 426, 464 n.11 (1949) (Frankfurter, J. dissenting); *Lichten v. Eastern Air Lines*, 189 F.2d 939 (2d Cir. 1951); SCHWARTZ, *supra*, 491; *see also id.* 492 n.253 (collecting cases). As a practical matter, if the NRC does adopt certain of the disposal proposals now before it, the plaintiffs will get the relief they seek, though on different legal grounds. If, on the other hand, the NRC fails to adopt one of those alternatives, the plaintiffs will not be left without a remedy. It must "be emphasized that primary jurisdiction gives the agency the first, not the last, word on the matter." SCHWARTZ , *supra*, 493. The initial, but not the final decision is given to the agency. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 496-99 (1958) (invalidating rate structure held to be within primary jurisdiction of Board in *Far East Conference*, 342 U.S. 570, and *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932)); *see* DAVIS, *supra*, § 22:7.

In sum, I do not believe that this injunctive action based on state law has been preempted, but rather that the NRC has primary jurisdiction over the issue underlying this action. Therefore the majority errs in affirming the dismissal of count I of the complaint. But it would also be error for the district court to proceed further in this litigation at this time. The proper course is for this court to reverse and remand with instructions that the district court stay its proceedings pending the NRC's decision in the proceedings now before it. *Pennsylvania Railroad Co. v. United States*,

363 U.S. 202 (1960); *Western Pacific Railroad*, 352 U.S. at 64; DAVIS, *supra*, 91-92. *Cf. Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (stay under doctrine of primary jurisdiction of common law tort action for fraudulent misrepresentation not appropriate where, *inter alia*, no technical expertise was relevant, there was no need for regulatory uniformity and the issues were within the court's competence). With the NRC's consideration of the disposal issue before it, the district court could then go on to consider whether the state law interests have been adequately considered, whether there is an actual conflict between the state and federal requirements, and, if it is not physically impossible for Kerr-McGee to obey both state and federal law, what is the proper relief for these plaintiffs.[2]

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[2] The majority reaches the extreme and unprecedented conclusion that the NRC has, in effect, exclusive jurisdiction over nonradiation hazards at the site in question.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 24, 1985

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**

No. 84-1294

DONALD E. BROWN; EDITH R. BROWN; EDWIN E. BROWN; BETTY WOLSFELD; and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969,

Plaintiffs-Appellants,

v.

KERR-MCGEE CHEMICAL CORPORATION,
a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 6323—**Frank J. McGarr**, *Chief Judge.*

* The Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

ORDER

The dissenting opinion in this case issued July 18, 1985, is modified as follows:

Page 24, 6th line from the bottom of page, delete: "But it would also be error to reverse and remand for further proceedings at this time. The proper course would be for the district court to stay its proceedings pending the NRC's decision in the proceedings now before it." Substitute therefor: "But it would also be error for the district court to proceed further in this litigation at this time. The proper course is for this court to reverse and remand with instructions that the district court stay its proceedings pending the NRC's decision in the proceedings now before it."

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on August 15, 1985, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny a rehearing.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

** Judge Cudahy voted to grant the petition for rehearing.